



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Anisa Kongvongsa

v

TNC Holdings Pty Ltd

(U2024/14720)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 5 FEBRUARY 2025

Unfair dismissal application filed out of time – circumstances exceptional – extension of time granted.

Introduction

[1] This decision concerns an application by Ms Anisa Kongvongsa (*Applicant*) for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009 (Act)* against her former employer, TNC Holdings Pty Limited (*Respondent*).

[2] The Applicant seeks an extension of time to lodge her unfair dismissal application in the Fair Work Commission (*Commission*).

[3] I conducted a hearing, by telephone, on 5 February 2025 in relation to the Applicant's request for an extension of time.

[4] The Applicant's alleged dismissal from her employment with the Respondent took effect on 29 October 2024. The Applicant lodged her unfair dismissal application in the Commission on 8 December 2024.

[5] Section 394(2) of the Act states that an application for an unfair dismissal remedy must be made 'within 21 days after the dismissal took effect', or within such further period as the Commission allows pursuant to s 394(3). The period of 21 days ended at midnight on 19 November 2024. The application was therefore filed 19 days outside the 21 day period. The Applicant asks the Commission to grant a further period for the application to be made under s 394(3).

[6] The Act allows the Commission to extend the period within which an unfair dismissal application must be made only if it is satisfied that there are 'exceptional circumstances'. Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor

unprecedented, nor even very rare.¹ Exceptional circumstances may include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together can be considered exceptional.²

[7] The requirement that there be exceptional circumstances before time can be extended under s 394(3) contrasts with the broad discretion conferred on the Commission under s 185(3) to extend the 14 day period within which an enterprise agreement must be lodged, which is exercisable simply if in all the circumstances the Commission considers that it is 'fair' to do so.

[8] Section 394(3) requires that, in considering whether to grant an extension of time, the Commission must take into account the following:

- (a) the reason for the delay;
- (b) whether the person first became aware of the dismissal after it had taken effect;
- (c) any action taken by the person to dispute the dismissal;
- (d) prejudice to the employer (including prejudice caused by the delay);
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.

[9] The requirement that these matters be taken into account means that each matter must be considered and given appropriate weight in assessing whether there are exceptional circumstances. I will now consider these matters.

Reasons for the delay

[10] The delay required to be considered in s 394(3)(a) is the period after the prescribed 21 day period for lodging an application. It does not include the period from the date the dismissal took effect to the end of the 21 day period.³ However, the circumstances from the time of the dismissal must be considered when assessing whether there is an acceptable reason for the delay, or any part of the delay, beyond the 21 day period.⁴

[11] The Act does not specify what reason for delay might tell in favour of granting an extension however decisions of the Commission have referred to an acceptable or reasonable explanation. The absence of any explanation for any part of the delay will usually weigh against an applicant in the assessment of whether there are exceptional circumstances, and a credible explanation for the entirety of the delay will usually weigh in the applicant's favour, however all of the circumstances must be considered.⁵

Relevant facts and submissions

[12] In her unfair dismissal application, the Applicant contends that she was physically assaulted by her boss, Mr Rohit Dhunna, on 27 October 2024, which caused her extreme trauma and left her with no choice but to resign on 29 October 2024. The Applicant gave the following

explanation in her unfair dismissal application for her application being filed outside the 21 day period provided for in the Act:

“I respectfully submit this explanation regarding the delay in lodging the unfair dismissal form within the prescribed time limit. This is my first time facing such a daunting situation at a workplace and I was unsure of the next steps to take. Being young and inexperienced employment matters, I didn’t have the necessary information or guidance to address what had happened. As a result, I felt overwhelmed and was concerned about the possible consequences of coming forward regarding this incident.

The circumstances surrounding my dismissal left me in a state of shock and extreme paranoia. This emotional impairment made it difficult for me to think clearly and take prompt action. I was struggling to cope with the situation and it took longer to get things in order which further delayed the lodgement of the claim.

On 4 November 2024, a few days after the incident, I attempted to call the Fair Work Commission to seek guidance after taking into account the advice of friends and family. However, while waiting in line, I became overwhelmed and scared, thinking about the possible consequences and retaliation that I might face if I follow through. This was further reinforced by my manager’s action immediately after the incident. I looked towards the guidance and support from my manager and gave her notice of what had happened. However, my concern and distress was simply dismissed as a ‘friendly joke’ on Rohit Dhunna’s part and advised me not to mention what had happened to my boyfriend as the situation might escalate. Combined with my lack of knowledge and the lack of professional advice, I did not know how to handle the situation or where to look for guidance without putting myself in a vulnerable position. This lack of confidence and concern for retaliation further delayed the claim. Over time, I began seeking advice and support from friends and family to understand better my rights in the processes of lodging unfair dismissal claim. This realisation gave me the confidence to continue to lodge the claim.

The dismissal caused me significant trauma, both emotionally and financially. The loss of my job, combined with the stress and anxiety of the situation, further impact of my ability to address this matter within the required timeframe.

I sincerely apologise for the delay in respectfully request that my application be accepted out of time due to the exceptional circumstances outlined above. Thank you for your understanding.”

[13] In an email to the Commission sent on 29 January 2025, the following further information was provided by the Applicant to support her request for an extension of time:

“I am writing to provide further evidence to support my reasons for lodging my unfair dismissal claim beyond the prescribed timeframe.

My delay in submitting the claim was due to extreme trauma and emotional distress caused by the circumstances of my resignation. I was also preoccupied with police claims on the situation, which affected my ability to take immediate action.

I have attached a medical certificate addressing the emotional distress and anxiety caused by my former employer physically assaulting me, which contributed to my inability to lodge the claim on time.”

[14] The Applicant also submitted a medical certificate from her general practitioner dated 12 December 2024. The medical certificate contains the following relevant information:

- The date of onset of the Applicant’s medical condition was 27 October 2024.
- The duration of the current functional impact of the Applicant’s condition is expected to be 13 weeks up to 24 months.
- The Applicant’s incapacity is expected to last from 12 December 2024 to 16 February 2025.
- The Applicant cannot do any work, study, or participate in activities of 8 or more hours per week. The Applicant is “unable to look for work, interviewing due to emotional distress of the physical assault that occurred at work”.

[15] The Applicant gave oral evidence, which I accept, that the reason she did not go to see her general practitioner prior to 12 December 2024 is because she was having difficulties opening up and reaching out for help after the incident on 27 October 2024.

[16] Although the medical report tendered by the Applicant is dated 12 December 2024, some four days after the Applicant filed her unfair dismissal application, and it addresses the Applicant’s incapacity from 12 December 2024 until 16 February 2025, it is consistent with the evidence given by the Applicant that the alleged assault on 27 October 2024 and her subsequent resignation on 29 October 2024 had a significant negative impact on her mental health and well-being in the period between 29 October 2024 and 8 December 2024. I accept the Applicant’s evidence, summarised in paragraphs [12] and [13], in relation to the reasons for her delay in filing her unfair dismissal application in the Commission.

[17] I do not consider that the Applicant being “unsure of the next steps to take” following her resignation on 29 October 2024 constitutes a reasonable or acceptable reason for the delay in lodging her unfair dismissal application in the Commission on 8 December 2024. However, I am satisfied that the incident on 27 October 2024 and the Applicant’s subsequent resignation on 29 October 2024 had a substantial negative impact on her mental health, which was a significant reason for the delay in lodging her application in the Commission. I consider that this reason for the delay was reasonable and acceptable in all the circumstances. It weighs in favour of a conclusion that there are exceptional circumstances.

Action taken to dispute the dismissal

[18] There is no suggestion in the material before the Commission that the Applicant took any step to dispute her dismissal other than filing her unfair dismissal application in the Commission. This is a neutral consideration.

Prejudice to the employer

[19] I cannot identify any significant prejudice that would accrue to the Respondent if an extension of time were to be granted. The mere absence of prejudice is not in my view a factor that would point in favour of the grant of extension of time. However, if one were to consider the absence of prejudice as favouring of an extension, I would attribute it little weight in the consideration of whether there are exceptional circumstances.

Merits of the application

[20] The Act requires me to take into account the merits of the application in considering whether to extend time. The competing contentions of the parties in relation to the merits of the unfair dismissal application are set out in the materials that have been filed, and I do not repeat them here. The substantial merits of the application are not able to be fully examined or agitated at this stage of the proceeding which is essentially interlocutory.

[21] The Respondent admits that Mr Dhunna “touched the Applicant on the neck” on 27 October 2024, but says that Mr Dhunna did this inadvertently, without thinking, and he did not intend to offend the Applicant. The Applicant reported the incident to the Police on 28 October 2024 and resigned from her employment on the following day.

[22] While the full facts and circumstances of Mr Dhunna’s “touching” of the Applicant on the neck on 27 October 2024 will need to be considered at a final hearing after relevant witnesses are cross examined, I am satisfied on the basis of the admission of physical “touching” that there is some merit in the Applicant’s claim that she was dismissed within the meaning of the Act and her dismissal was unfair. I consider the merits of the application to weigh in support of a finding of exceptional circumstances and the granting of an extension of time.

Fairness as between the person and other persons in a similar position

[23] This consideration may relate to matters currently before the Commission or to matters previously decided by the Commission. It may also relate to the position of various employees of an employer responding to a general protections application. However, cases of this kind will generally turn on their own facts.

[24] Neither party made any submissions in relation to this factor. In all the circumstances, I consider this factor to be a neutral consideration.

Conclusion

[25] Taking into consideration the matters I am required to take into account under s 394(3) of the Act and all the matters raised by the parties, I am satisfied that there are exceptional circumstances in this case and it is appropriate, for the same reasons, to exercise my discretion to extend time for the unfair dismissal application to be lodged in the Commission. The circumstances of this case are out of the ordinary course and unusual, in that Mr Dhunna physically “touched” the Applicant on the neck on 27 October 2024, she resigned two days later, the incident had a substantial negative impact on the Applicant’s mental health and this contributed in a significant way to the delay in filing the application in the Commission.

[26] For the reasons given, I will extend the time for the Applicant to lodge her unfair dismissal application to 8 December 2024. An order will be issued to that effect [[PR784025](#)].

[27] The unfair dismissal application is listed for conciliation, by telephone, before Deputy President Saunders at 3pm on 17 February 2025.



DEPUTY PRESIDENT

Appearances:

Ms A. Kongvongsa appeared for herself

Ms K. Lopes, solicitor, appeared for the Respondent

Hearing details:

2025.

Newcastle (by telephone):

5 February.

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¹ *Nulty v Blue Star Group Pty Ltd* [[2011](#)] FWA FB 975 at [13].

² *Ibid.*

³ *Long v Keolis Downer* [[2018](#)] FWC FB 4109 at [40].

⁴ *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [[2015](#)] FWC FB 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [[2014](#)] FWC FB 2149 at [31]; *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic* [[2016](#)] FWC FB 349 at [29]-[31].

⁵ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [[2018](#)] FWC FB 901 at [39].